Supreme Court, U.S.
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NO. 01-10868

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES KENNETH FOSTER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

CAPITAL CASE

Respondent reframes the questions presented as:

QUESTION I

WHETHER THE FLORIDA STATUTES ALLOWING EXPECTANT MOTHERS AND MOTHERS OF YOUNG CHILDREN TO BE EXEMPT FROM JURY SERVICE VIOLATED EQUAL PROTECTION?

QUESTION II

WHETHER HARMLESS ERROR ANALYSIS VIOLATES DUE PROCESS OR THE RIGHT TO A JURY TRIAL?

QUESTION III

WHETHER AN EXTENDED STAY ON DEATH ROW CONSTITUTES CRUEL OR UNUSUAL PUNISHMENT?

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NO. 01-10868

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES KENNETH FOSTER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

OPINION BELOW

The opinion and judgment of the Florida Supreme Court sought to be reviewed in this petition is *Foster v. State*, 810 So.2d 910 (Fla. 2002).

JURISDICTION

Jurisdiction exists pursuant to 28 U.S.C. § 1257(a). The Florida Supreme Court's opinion in this case was issued on February 14, 2002. No motion for rehearing was filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida's persons disqualified or excused from jury service statute, § 40.01(1), Florida Statutes (1975) provided:

> . . . expectant mothers and mothers with children under 15 years of age, upon their request, shall be exempted from grand and petit jury duty.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The facts of this case are recited in *Foster v. State*, 369 So.2d 928 (Fla.1979):

> Anita Rogers, 20 years of age, and Gail Evans, 18 years of age, met defendant and the victim, Julian Lanier, at a bar. They knew defendant, but the victim was a stranger. The girls, after a discussion, agreed to go to the beach or somewhere else to drink and party with the men. The victim bought whiskey and cigarettes, after which the four of them left in the victim's Winnebago camper. The victim was quite intoxicated and surrendered the driving chore to Gail. The defendant and the girls had planned for Gail to have sex with the victim and make some money. Gail parked the vehicle in a deserted area and, after some conversation concerning compensation, the victim and Gail began to disrobe.
>
> Defendant suddenly began hitting the victim and accusing him of taking advantage of his sister. Defendant then held a knife to the victim's throat and cut his neck, causing it to bleed profusely. They dragged the victim from the trailer into the bushes where they laid him face down and covered him with pine branches and leaves. They could hear the victim breathing so defendant took a knife and cut the victim's spine.
>
> The girls and defendant then drove off in the Winnebago and found the victim's wallet underneath a mattress. The defendant and the girls split the money found in the wallet and left the vehicle parked in the parking lot of a motel.
>
> The next morning Anita Rogers went to the Sheriff's Department and reported what had happened. She had been committed to a mental institution when she was 13 years of age and was not charged with any offense in this case.
>
> Defendant was charged by an indictment with the offenses of first-degree murder and robbery. The defendant testified and, during his description of the events of the evening, testified as follows:
>
> I reckon I'll just cop out. I have done it, killed him deader than hell. I ain't going to set up here, I am under oath and I ain't going to tell no fucking lies. I will ask the Court to excuse my language. I am the one that done it. They didn't have a damn thing to do with it. It was premeditated and I intended to kill him. I would have killed him if he hadn't had no money and I know I never told you about it, but I killed him.
>
> The jury returned verdicts finding defendant guilty of robbery, premeditated murder in the first degree, and felony murder.

Foster, 369 So.2d at 928-29 (Fla.1979).

The procedural history of this case is recited in *Foster v. State*, 810 So.2d 910 (Fla. 2002):

> Foster was convicted of the first-degree murder and robbery of Julian Lanier, and, after the jury recommended death, the trial court sentenced him to death. Foster's conviction and sentence were affirmed by the Florida Supreme Court. The Florida Supreme Court subsequently affirmed the trial court's denial of Foster's first postconviction motion, see *Foster v. State*, 400 So.2d 1 (Fla.1981), and also affirmed the trial court's denial of Foster's second postconviction motion. See *Foster v. State*, 518 So.2d 901 (Fla.1987). However, the Florida Supreme Court granted Foster's habeas petition and remanded for a new sentencing proceeding based on a *Hitchcock* error. See *id.* at 902. Foster's resentencing jury recommended death by an eight-to-four vote and the trial court imposed a death sentence. See *Foster v. State*, 614 So.2d 455, 458 (Fla.1992). In addition, pending resentencing, Foster filed a third postconviction motion, which the trial court summarily denied. See *id.* Upon review of the denial of postconviction relief and of resentencing, the Florida Supreme Court affirmed the denial of Foster's third postconviction motion, but vacated Foster's death sentence and remanded the case for the trial court to enter a new sentencing order consistent with *Rogers v. State*, 511 So.2d 526 (Fla.1987), and *Campbell v. State*, 571 So.2d 415 (Fla.1990). See *Foster*, 614 So.2d at 465.
>
> Pursuant to our remand, the trial court entered a new sentencing order, reimposing the death sentence, and this Court subsequently affirmed the sentence. See *Foster v. State*, 654 So.2d 112, 113 (Fla.1995). The trial court found three statutory aggravators: (1) the murder was committed while Foster was engaged in the commission of or attempt to commit robbery; (2) the crime was especially heinous, atrocious, or cruel; and (3) the murder was committed in a cold, calculated, and premeditated manner (CCP). See *id.* at 113-14. The trial court found fourteen nonstatutory mitigators: (1) Foster murdered Lanier while he was under the influence of emotional or mental disturbance (little weight); (2) Foster's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was impaired (little weight); (3) Foster has an abusive family background (very little weight); (4) Foster's poverty (very little weight); (5) Foster's physical illnesses (very little weight); (6) Foster's love for, and love by, his family (very little weight); (7) Foster's alcohol and/or drug addiction (very little weight); (8) Foster's troubled personal life (very little weight); (9) Foster's physical

injuries (very little weight); (10) Foster's lack of childhood development (very little weight); (11) Foster's struggle with the death of loved ones (very little weight); (12) Foster's learning disabilities; (13) Foster's potential for positive sustained human relationships (very little weight); and (14) Foster's remorse for the crime (very little weight). See id. at 113 n. 5.

On September 7, 1999, Foster filed his fourth 3.850 motion, which represents the first 3.850 motion filed after the trial court entered a new sentencing order pursuant to our remand citing *Campbell*. A *Huff* hearing on this motion was held on November 27, 2000. On December 29, 2000, the trial court summarily denied the motion on all grounds. Foster now appeals the trial court's summary denial of his fourth 3.850 motion, alleging that the trial court erred in denying him an evidentiary hearing, and he petitioned separately for a writ of habeas corpus.

Foster, 810 So.2d at 912-914 (footnotes omitted).

On appeal to the Florida Supreme Court, Foster raised five claims: 1) the trial court erred by denying without a hearing on his claim that his right to an impartial jury was violated; (2) the trial court erred by denying without a hearing Foster's claim that his conviction for both felony murder and premeditated murder violated double jeopardy; (3) the trial court erred by denying without a hearing Foster's *Brady* claim; (4) the trial court erred by denying without a hearing Foster's claim that the twenty-three years that Foster has spent on death row constitutes cruel and unusual punishment; and (5) the Florida Supreme Court engaged in a constitutionally flawed harmless error analysis regarding the CCP aggravator in *Foster v. State*, 654 So.2d 112 (Fla.1995). The Florida Supreme Court rejected these claims and affirmed the trial court's summary denial. *Foster*, 810 So.2d at 914.

ARGUMENT

QUESTION I

WHETHER THE FLORIDA STATUTES ALLOWING EXPECTANT MOTHERS AND MOTHERS OF YOUNG CHILDREN TO BE EXEMPT FROM JURY SERVICE VIOLATED EQUAL PROTECTION?

Foster asserts that Florida's statute excusing expectant mothers and mothers with children under 15 years of age from jury service violates equal protection. This Court lacks the authority to address this claim. The Florida Supreme Court found this claim to be procedurally barred:

Foster claims the trial court erred by summarily denying the claim that his right to have an impartial jury was violated because a fair cross-section of the community was not available to serve on his jury due to the trial judge excusing a certain class of prospective jurors. Specifically, Foster alleges for the first time in this 3.850 motion that pregnant women and women with small children were automatically excused from the jury venire before voir dire began, pursuant to a flawed statutory exemption scheme. Foster bases this allegation on the fact that the State's jury notes, which allegedly were not previously available to him, do not affirmatively indicate that potential jurors were not excused. Foster states that if the trial court automatically excused this class of people, it did so improperly because the statute provided, "[E]xpectant mothers and mothers with children under 15 years of age, upon their request, shall be exempted from grand and petit jury duty." § 40.01(1), Fla. Stat. (1975) (emphasis added). Foster claims that he was entitled to an evidentiary hearing to explore whether or not jurors were improperly excused.

We find this claim is procedurally barred because Foster's challenge to the procedure in which jurors were excused was not properly preserved at the trial level. See *Hoskins v. State*, 702 So.2d 202 (Fla.1997) (holding that the defendant's challenge to the trial court's practice of having the court clerk automatically excuse prospective jurors pursuant to section 40.013(5), Florida Statutes (1995), was not timely filed because the excusals had already been made and the defendant did not challenge his jury panel). We therefore affirm the trial court's summary denial of this claim.

Foster, 810 So.2d at 914-915.[1]

A state Supreme Court's finding that a claim is procedurally barred, normally bars this Court's review the claim. *Sochor v. Florida*, 504 U.S. 527, 534 (1992)(holding this Court was without authority to address a claim that the Florida Supreme Court had found to be not preserved for appeal). In *Coleman v. Thompson*, 501 U.S. 722, 729 (1991), this Court reaffirmed that "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." This Court has also explained that any opinion from this Court in such a situation would be purely advisory. *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997)(finding lack of jurisdiction to review independently supported judgments on direct appeal and observing

[1] In a footnote the Florida Supreme Court rejected the attempt to cast this claim as newly discovered evidence:

> Foster's argument that this claim may be brought as a newly discovered evidence claim is refuted by the fact that in his own 3.850 motion, he admits he knew that the judge conducted a voir dire outside his and counsel's presence. The initial prong for determining whether something constitutes "newly discovered evidence," involves the fact that it must have been unknown by the trial court, by the party, or by counsel at the time of trial and the defendant, or his counsel could not known of it through due diligence. *See Jones v. State*, 709 So.2d 512, 521 (Fla.1998). Foster knew of the ex parte meeting with the jury venire at the time of his trial; his counsel could have attempted to discover what went on at that meeting through due diligence, and filed a timely pretrial motion. Thus, this allegation is not properly raised as one pursuant to newly discovered evidence.

Foster, 810 So.2d at 915, n.5.

that because the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory). Thus, this Court lacks authority to review a question of federal law because the state court's decision rested on state law ground that is independent of the federal question and adequate to support the judgment.

Florida's statute, as it existed at the time of trial, did not violate equal protection. The persons disqualified or excused from jury service statute, § 40.01(1), Florida Statutes (1975), provided:

> . . . expectant mothers and mothers with children under 15 years of age, upon their request, shall be exempted from grand and petit jury duty.

The right to a jury trial includes a right that the jury be drawn from a representative cross-section of the community without the systematic exclusion of large, distinct and identifiable segments of the community. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975)(invalidating sections of Louisiana's constitution and criminal procedure code which precluded women from serving on a jury unless they expressly requested to serve in writing). To make a prima facie case that the fair cross-section requirement has been violated, a defendant must show that: (1) the group allegedly excluded is a distinctive part of the community, (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection

process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979)(holding a Missouri statute which exempted all women from jury service unconstitutional).

No distinctive group is excluded by operation of this statute. The statute is not based on gender. For example, women without children are not exempt. Neither are mothers of children over 15 years of age. Additionally, even the classes exempted by the statute, expectant mothers and mother of young children, are not a distinctive group. Pregnancy is not an immutable characteristic; rather, it is a temporary condition. Neither is being the mother of a young child. As their children grow, these women are no longer exempt from jury service. This classification is not a "group" because all women will necessarily fall out of the group at some point in time. No woman remains pregnant or the mother of a young child. *McArthur v. State*, 351 So.2d 972, 975 (Fla.1977)(holding this statute does not infringe upon a defendant's right to a jury composed of a fair cross-section of the community and explaining that to evoke constitutional concern, the group excluded must be sufficiently distinctive and concluding that mothers of young children are not so distinctive as to evoke Sixth Amendment concerns); *Hitchcock v. State*, 413 So.2d 741 (Fla. 1982)(holding that persons with young children do not comprise a constitutionally significant class and distinguishing Florida's statute which provided only a limited exemption for particular women from the statute at issue in *Durden*); *Johnson v. McCaughtry*, 92 F.3d 585, 593 (7th Cir.1996) (collecting cases and concluded that

"young persons" do not constitute a distinctive group under *Duren* and the systemic exclusion of them based on jury commissioner's personal view that they were not mature enough was not a Sixth Amendment violation); *Willis v. Zant*, 720 F.2d 1212 (11th Cir.1983)(establishing a test for what is a distinctive group including the following factors: (1) the existence of qualities that define a group, (2) similarity of attitudes, beliefs, or experiences, and (3) a community of interest among group members and rejecting a claim that 18 to 30 year-olds are a distinctive group);*United States v. Fletcher*, 965 F.2d 781, 782 (9th Cir. 1992)(adopting *Willis* test for determining whether a group is distinct and concluding that college students are not a distinct class because anyone may be a college student); *Aultman v. State*, 621 So.2d 353 (Ala. Crim. App. 1992)(rejecting a fair cross-section challenge based on college students and young adults because they are not distinctive group because they do not share "immutable and unchangeable characteristics"). The "group" excluded under this statute, *i.e.*, pregnant woman and mothers of children under 15 years, is not constitutionally significant.[2]

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[2] Foster argues that he is entitled to an evidentiary hearing to prove systematic exclusion rather than exclusion upon request. This claim does not require an evidentiary hearing. The statute itself established that two groups, expectant mothers and mothers of children under 15 years of age, were excluded. If the systemic exclusion of such a group is not a violation of the right to a jury trial, then exclusion upon request necessarily also is not a violation. Such a claim does not require an evidentiary hearing because regardless of the actual facts established, *i.e*, whether there was systemic exclusion or only exclusion upon request, neither violates the constitution. To establish a right to an evidentiary hearing, Foster must allege facts that, if true, would

entitle him to relief. Foster is not entitled to relief even if there was systemic exclusion. Thus, Foster is not entitled to an evidentiary hearing.

QUESTION II

WHETHER HARMLESS ERROR ANALYSIS VIOLATES DUE PROCESS OR THE RIGHT TO A JURY TRIAL?

Foster asserts any harmless error analysis violates due process and the right to a jury trial. The Florida Supreme Court found this claim to be not cognizable in post-conviction proceedings and procedurally barred by the law of the case doctrine. The Florida Supreme Court found:

> Foster alleges this Court engaged in a constitutionally flawed harmless error analysis regarding our conclusion in *Foster v. State*, 654 So.2d 112, 115 (Fla.1995), in which we stated that because the trial court found no statutory mitigators and three strong aggravators, the giving of an erroneous cold, calculated, and premeditated aggravator instruction did not affect the jury's consideration of his sentence, and therefore the giving of such instruction was harmless error. A postconviction motion is not the proper vehicle to challenge a decision of this Court. Rule 3.850 motions are a vehicle provided to challenge collateral issues related to the trial court proceedings, not appellate decisions. See Fla. R.Crim. P. 3.850(a)(1)-(6). Further, this claim is procedurally barred because it is an improper relitigation of an issue upon which this Court has already ruled. See *Brown v. State*, 596 So.2d 1026, 1028 (Fla.1992). We therefore affirm the trial court's summary denial of this claim.

Foster, 810 So.2d at 916.

A state Supreme Court's finding that a claim is not cognizable in post-conviction proceedings and is procedurally barred by the law of the case doctrine, normally bars this Court's review the claim. *Sochor v. Florida*, 504 U.S. 527, 534 (1992)(holding this Court was without authority to address a claim that the Florida Supreme Court had found to be not preserved for appeal). In *Coleman v. Thompson*, 501 U.S. 722, 729 (1991), this Court reaffirmed that "will not review a question of federal law decided

by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." This Court has also explained that any opinion from this Court in such a situation would be purely advisory. *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997)(finding lack of jurisdiction to review independently supported judgments on direct appeal and observing that because the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory). Thus, this Court lacks authority to review a question of federal law because the state court's decision rested on state law ground that is independent of the federal question and adequate to support the judgment.

Foster, for the first time in this Court, argues that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) has *sub silentio* overruled *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990).[3] While Foster

[3] This Court has held that harmless error analysis is proper in a capital case. *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990)(holding that the right to jury trial is not infringed when state appellate court invalidates an aggravating factor found by jury but affirms death sentence after itself finding that the remaining valid aggravating factors outweigh mitigating evidence); *Jones v. United States*, 527 U.S. 373, 402 (1999)(concluding, in a direct appeal of a federal death penalty case, that any error in the nonstatutory aggravators of victim vulnerability and victim impact was harmless and explaining that harmless error review of a death sentence may be performed in at least two different ways: (1) an appellate court may choose to consider whether absent an invalid factor, the jury would have reached the same verdict or (2) it may choose instead to consider whether the result would have been the same had the invalid aggravating factor been precisely defined citing *Clemons v. Mississippi*, 494 U.S. 738, 753-54 (1990)).

asserted in the Florida Supreme Court that the Florida Supreme Court conducted a flawed harmless error analysis on the cold, calculated and premeditated aggravator[4], his argument assumed the validity of *Clemons*. Foster never attacked the validity of *Clemons* in the Florida Supreme Court.[5] Foster did not assert that *Apprendi* has overruled *Clemons* in either his brief or his habeas petition in state court. Indeed, he did not cite *Apprendi* in either his brief or habeas petition. Nor did the Florida Supreme Court rule on the issue of whether *Apprendi* conflicts with *Clemons*. Foster's

[4] In Foster's direct appeal from a resentencing, *Foster v. State*, 654 So.2d 112 (Fla. 1995), the Florida Supreme Court found that the jury instruction on the cold, calculated, and premeditated aggravator was improper, based on *Jackson v. State*, 648 So.2d 85 (Fla. 1994), because the instruction did not adequately explain the difference between the premeditation required to convict for first-degree murder and the heightened premeditation required to find the CCP aggravator. However, the Florida Supreme Court found that the error was harmless. The *Foster* Court explained that the giving of an erroneous CCP instruction could be harmless, if the State establishes "beyond a reasonable doubt that the invalid CCP instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given." The *Foster* Court concluded that the error was harmless because the murder could only have been cold, calculated, and premeditated. The Florida Supreme Court found it "particularly telling" that after having concealed Lanier's body with bushes, Foster then proceeded to cut Lanier's spine with a knife when he realized that Lanier was still breathing and that Foster had "ample" time to reflect on his actions and their attendant consequences, after concealing Lanier's body and before cutting Lanier's spine, which was "compelling evidence of the heightened level of premeditation required to establish the cold, calculated, and premeditated aggravator." *Foster*, 654 So.2d at 115.

[5] His argument seems to have been that the insufficiency of the evidence of the robbery aggravator, coupled with the invalid cold, calculated and premeditated aggravator, rendered the particular harmless error analysis flawed and therefore, was a violation of due process.

Apprendi challenge to harmless error analysis was never presented to the Florida courts and therefore, the question presented in this Court was not adequately raised in the state courts.[6]

Furthermore, neither *Apprendi v. New Jersey*, 530 U.S. 466 (2000) nor *Ring v. Arizona*, 122 S.Ct 2428 (2002) have *sub silentio* overruled *Clemons*. In *Ring*, the United States Supreme Court held that the Sixth Amendment right to a jury trial applied to capital cases and requires that the factfinding necessary to sentence a defendant to death be done by a jury. The *Ring* Court reasoned that because aggravating factors operate as the functional equivalent of an element, the Sixth Amendment requires that they be found by a jury. The *Ring* Court overruled *Walton v. Arizona*, 497 U.S. 639 (1990) because it was "irreconcilable" with *Apprendi*. The *Ring* Court limited its holding to states that allow a judge, "sitting without a jury", to impose death. The *Ring* Court noted that petitioner was not challenging the validity of *Clemons*. *Ring*, 122 S.Ct. at 2437, n.4.

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[6] This Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992). The question must be put with fair precision including citing the relevant caselaw. *Adams v. Robertson*, 520 U.S. 83, 88 (1997)(finding federal question not properly presented where party cited the relevant case but cited it for entirely different argument in state court). When a party is arguing that a case has overruled established precedent *sub silentio*, that party must cite that case. Otherwise, the state court will merely follow the established precedent. If the party has not cited the particular case and the state court follows the established precedent, the state court cannot fairly said to have be presented with the issue. Where the issue in the federal petition was not properly presented in state court, the case is not appropriate for certiorari review.

Even in the wake of *Ring*, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. *Ring* is limited to the finding of an aggravator, not any additional aggravators, nor mitigation, nor any weighing. *Ring*, 122 S.Ct. 2445 (Scalia, J., concurring)(explaining that the fact finding necessary for the jury to make in a capital case is limited to "an aggravating factor" and does not extend to mitigation or to the ultimate life-or-death decision which may continue to be made by the judge); *Ring*, 122 S.Ct. 2445 (Kennedy, J., concurring)(noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict). Constitutionally, to be eligible for the death penalty, all the sentencer must find is one narrower, *i.e.*, one aggravator, at either the guilt or penalty phase. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994)(observing "[t]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."). So, once a jury has found one aggravator, the constitution is satisfied, the judge may do the rest. The trial judge may make additional findings in aggravation or mitigation, perform any weighing and may be the ultimate decision maker. Just as a trial judge may perform any weighing and may be the ultimate decision maker, an appellate court may engage in any factfinding necessary to perform a harmless error analysis without violating the right to a jury trial. A capital defendant

does not have a Sixth Amendment right to have a jury weigh aggravation and mitigation, so any reweighing by appellate judges does not violate the Sixth Amendment.[7] Hence, an appellate court conducting harmless error analysis does not violate the right to a jury trial.[8]

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[7] In *Ring*, this Court created a constitutional right to have a jury determine an aggravator. However, the failure of the jury to make that finding is, itself, subject to harmless error analysis. *United States v. Cotton*, 122 S.Ct. 1781 (May 20, 2002)(holding the indictment's failure to allege a quantity of drugs and finding of element of quantity by judge rather than jury was not structural error where the evidence of the amount was overwhelming and essentially uncontroverted citing *Johnson v. United States*, 520 U.S. 461, 466-467 (1997)); *Neder v. United States*, 527 U.S. 1 (1999)(holding that harmless error analysis applies to the omission of an element and does not violate the Sixth Amendment); *Ring*, 122 S.Ct. at 2443, n.7. (declining reach harmless error argument that finding of aggravator was implicit in the jury's guilty verdict and remanding for lower court to do so). Thus, the failure of a jury to make the finding of an aggravator is subject to harmless error analysis as well.

[8] Furthermore, the logic of Foster's position is not limited to the harmless error analysis associated with aggravators in capital cases, it applies equally to all other elements in all cases. All appellate courts would have to cease performing any harmless error analysis in all criminal cases. Appellate courts would return to being "impregnable citadels of technicality." *Kotteakos v. United States*, 328 U.S. 750, 759 (1946).

QUESTION III

WHETHER AN EXTENDED STAY ON DEATH ROW CONSTITUTES CRUEL OR UNUSUAL PUNISHMENT?

Foster asserts that his extended stay on death row constitutes cruel and unusual punishment. Foster has been on death row since 1975. The Florida Supreme Court rejected this challenge stating:

> Foster argues the trial court erred when it summarily denied his claim that the twenty-three years he has spent on death row constitutes cruel and unusual punishment. We have previously held an extended stay on death row does not constitute cruel and unusual punishment. *See Knight v. State*, 746 So.2d 423, 437 (Fla.1998). . . Therefore, we affirm the trial court's summary denial of this claim, as we find that it is without merit.

Foster, 810 So.2d at 916.

Three Justices of this Court have expressed views on delays in capital sentencing. *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., dissenting from a denial of certiorari); *Elledge v. Florida*, 525 U.S. 944 (1998)(Breyer, J., dissenting from a denial of certiorari); *Knight v. Florida* 528 U.S. 990 (1999)(Thomas, J., concurring in the denial of certiorari). As Justice Thomas explained, the delay in carrying out executions stems from this Court's "Byzantine" death penalty jurisprudence. *Knight*, 528 U.S. at 998. He noted that lengthy delays between sentencing and execution was an inevitable consequence of this Court's mandates. He noted that the common law practice of executing the defendant one day after sentencing would indeed have the deterrent effect lacking in the current system, but such a practice would find little support from this Court. *Knight*, 528 U.S. at n.1. Justice Thomas also noted the state and lower federal courts had rejected

Justice Stevens' invitation to serve as laboratories. He noted that Alabama, Arizona, California, Montana and Texas Courts as well as the Fifth and Tenth Circuits had rejected such claims and therefore, the Court should consider the experiment concluded.[9]

The courts of Arkansas, Florida, Idaho, Illinois, Mississippi, Nebraska, and Tennessee have now joined.[10] The Eighth Circuit has joined as well.[11] No court has adopted this position.[12] The experiment has indeed concluded.

The California Supreme Court has recently held that two decades on death row did not amount to cruel and unusual punishment. *People v. Anderson*, 22 P.3d 347 (Cal. 2001). The *Anderson* Court explained that the appeals process is a constitutional safeguard, not a constitutional defect. The California Supreme Court observed that any delay argument was untenable because if the death sentence is reversed on appeal, a defendant has suffered no conceivable prejudice and if the death sentence is affirmed, the delay has prolonged his life. The *Anderson* Court noted that a defendant can have no conceivable complaint about his extended incarceration because life without possibility of parole is the minimum sentence. In other words, a defendant would been facing prolonged incarceration regardless of the delay. *Anderson*, 22 P.3d at 389-390.

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[9] *Ex parte Bush*, 695 So.2d 138, 140 (Ala.1997); *State v. Schackart*, 947 P.2d 315, 336 (Ariz. 1997); *People v. Frye*, 959 P.2d 183, 262 (Cal. 1998); *People v. Massie*, 967 P.2d 29, 44-45 (Cal. 1998); *State v. Smith*, 931 P.2d 1272, 1287-1288 (Mont. 1996); *Bell v. State*, 938 S.W.2d 35, 53 (Tex. Crim. App. 1996); *White v. Johnson*, 79 F.3d 432, 439-440 (5th Cir. 1996); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995).

[10] *Hill v. State*, 962 S.W.2d 762, 765 (Ark. 1998)(holding delay of 15 years that was not attributable to the defendant was not cruel and unusual punishment); *Booker v. State*, 773 So.2d 1079, 1096 (Fla. 2000)(holding delay of over two decades on death row was not cruel and unusual punishment); *McKinney v. State*, 992 P.2d 144, 150-52 (Idaho 1999)(holding delay of 17 years of solitary confinement on death row was not cruel and unusual punishment); *People v. Simms*, 736 N.E.2d 1092,1141 (Ill. 2000)(holding delay of 15 years was not cruel and unusual punishment); *Jordan v. State*, 786 So.2d 987, 1028 (Miss. 2001)(holding delay of 22 years was not cruel and unusual punishment); *State v. Moore*, 591 N.W.2d 86, 93 (Neb. 1999)(rejecting as "completely without merit" delay of 19 years was not cruel and unusual punishment and characterizing the claim as a "mockery of justice to conclude that delays caused by satisfying the Eighth Amendment themselves violate it."); *State v. Austin*, 2001 WL 242576, *37 (Tenn.Crim.App.2001)(holding delay of 24 years, "caused in large part by numerous appeals and collateral attacks lodged by the Appellant" was not cruel and unusual punishment)

[11] *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998)

[12] Only one court has followed this logic and it later changed its position. *State v. Richmond*, 886 P.2d 1329 (Ariz. 1994)(commuting a death sentence to life based in part on the lengthy delay of nearly thirty years); but see *State v. Schackart*, 947 P.2d 315, 336 (Ariz. 1997)(perceiving no constitutional violation because there is no evidence that Arizona has set up a scheme prolonging incarceration in order to torture inmates prior to their execution); *State v. Mata*, 916 P.2d 1035 (Ariz 1996)(abrogating *Richmond* and finding that the statutory aggravating factor of heinous, cruel, or depraved manner was not unconstitutionally vague and those who were subject to that aggravating factor, did not have to be resentenced).

As the Eighth Circuit observed, the delay in capital cases, in large part, "is a function of the desire of our courts, state and federal, to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone's life." *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998)(stating that a fifteen year delay does not "even begin to approach a constitutional violation"). There is nothing unusual about a significant period between a death penalty being imposed and the execution. Unfortunately, it is all too usual for defendants to be executed only after an extended length of time on death row. An extended stay on death row certainly is not unusual, rather it is quite common.

Furthermore, the Florida Supreme Court has taken steps to closely monitor death penalty cases with tight time constraints to address the "virtually endemic" delays which are "totally unacceptable". *State v. Williams*, 797 So.2d 1235, 1242 (Fla. 2001)(Wells, C.J., concurring)(quoting a trial court's order and observing the need to make such cases a priority in a case with a 19 year delay). These are the appropriate remedies for delays in capital cases, not abolishing the death penalty which this argument is merely a species of. Thus, an extended stay on death row is not cruel and unusual punishment.

CONCLUSION

Respondent, the State of Florida, respectfully requests this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI has been furnished by U.S. Mail to Joseph F. McDermott, Esq., 7116-A Gulf Boulevard St. Petersburg, FL 33706, on July 22, 2002.

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